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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY                       
DEPUTY

NO. 44240-0-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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JUSTIN NELSON and ALLISA ADAMS-NELSON,

Appellants,

v.

SKAMANIA COUNTY,

Respondent,

and

SHANNON FRAME,

Additional Defendant.

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BRIEF OF RESPONDENT SHANNON FRAME

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pm 6/24/13

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## I. IDENTITY OF RESPONDENT

Shannon Frame is the Respondent herein. Shannon Frame requests that the Court affirm the summary judgment of dismissal entered by the trial court.

## II. INTRODUCTION

This lawsuit involves a claim by Justin Nelson and Allisa Adams-Nelson (“Nelson”) against Shannon Frame, arising from an old landfill/burn dump that was operated by Skamania County many decades ago. The site was replaced by a transfer station more than 30 years ago, and the old dump site was cleaned up around the same time. (CP 42-43).

The property on which the County’s transfer station is located consists of 9.5 acres. The transfer station is more than 700 feet from the boundary with the neighboring property to the north. (CP 2). Nelson purchased the adjacent property in 2007, some 30 years after the dumpsite had been discontinued and cleaned up. (CP 47). Nelson observed debris on his property in early 2007 which he attributed to the old County dumpsite. (CP 49-50). He filed this lawsuit against Skamania County in 2012 and subsequently added Shannon Frame as an additional defendant, seeking recovery of damages under theories of tort and inverse condemnation.

The trial court properly dismissed the action, based on the statute of limitations, the absence of the elements of a “continuing trespass” and the absence of standing for an inverse condemnation claim. Shannon

Frame respectfully asks this Court to affirm.

### III. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

Shannon Frame believes that the issues pertaining to Nelson's assignment of errors can best be stated as follows:

A. Whether a landowner's claim arising from dumping of debris from an adjacent property is subject to dismissal where (1) any tortious activity occurred more than 30 years before suit was filed; and (2) the landowner was aware of the alleged damage more than three years before filing suit.

### IV. STATEMENT OF FACTS

Nelson purchased undeveloped property in February 2007 that is more than 700 feet from a transfer station owned and operated by Respondent Skamania County. (CP 73-74). The transfer station property was formerly the site of a "landfill-burn dump" operated by Skamania County between the 1950s and the late 1970s. (CP 42-43). The dump site was replaced by a transfer station in the early 1980s with funding and approval from the Washington State Department of Ecology. (CP 45). For the past several decades, debris that is brought to the transfer station has been placed into containers, which are then trucked to a different location for disposal. The current facility is clean and safely operated, as photos submitted by Nelson clearly show. (CP 115-126). There is no evidence of any dumping of refuse by Skamania County (outside of the transfer containers) for the past 35 years.

After the old dump was closed, Skamania County substantially cleaned up debris which originated from the dump. (CP 43). The land between the old dumpsite and Nelson's property is heavily forested, as shown by photographs. (CP 112).

Nelson visited and inspected the adjacent property on three separate occasions before purchasing it. (CP 47). Shortly after Nelson purchased the property in early 2007, he commissioned a survey to confirm the boundaries of his property. The surveyor discussed with Nelson that there was debris on his property. Nelson concluded that the debris on his property originated from the old County dumpsite. (CP 50). Nelson took no action against Shannon Frame at that time.

In September 2008, a neighbor complained to Skamania County that Nelson had been clearing vegetation and building bonfires on a portion of Nelson's property next to Canyon Creek. An investigation by Skamania County revealed unpermitted logging and other disturbances within the riparian buffer area of Canyon Creek, including the construction of a bridge and other structures without permits. (CP 50-55). Nelson was ordered to undertake mitigation measures for his unpermitted activity within the critical area.

In March 2012, Nelson sued Skamania County, alleging that the County's operation of the old landfill decades earlier allowed debris to reach the adjoining property he purchased in 2007. He subsequently amended his Complaint to add a claim against Shannon Frame, who sold

the land to Nelson in 2007. His Amended Complaint alleged that Frame did not fully disclose that a portion of the property had been “taken” by the County. (CP 12-13).

Nelson contends that the value of his property is diminished because of the presence of debris from the old landfill. Shannon Frame denies that there is significant debris from the old landfill on Nelson’s undeveloped property. As noted above, Nelson’s lot is at least 700 feet (more than two football fields) from the current transfer station. Moreover, after the old dump was closed, Skamania County cleaned up the significant debris which may have originated from the dump. (CP 43). Shannon Frame believes that most of the debris on Nelson’s property is from illegal dumping from private parties.

But even if Nelson could produce competent evidence that some of the debris on his property originated from operation of the old Skamania County landfill decades ago, his claims are not timely, and he has no standing to assert such claims.

After taking the deposition of Justin Nelson, Skamania County moved for summary judgment. At the summary judgment hearing on October 5, 2012, the Honorable Diane Woolard requested additional briefing from the parties with respect to the “continuing trespass” claim. Following submission of that supplemental briefing, the trial court entered summary judgment in favor of Skamania County on October 30, 2012. A revised order also dismissed Nelson’s claim against Mr. Frame. This

appeal followed.

## V. ARGUMENT

### A. The Statute of Limitations is Not a Disfavored Defense.

There is no competent evidence of “substantial damage” from the ancient dumpsite which is present on plaintiffs’ property now, but not present before the three year limitations period (before March 2009).

Plaintiffs have offered no photographs or any other evidence showing any portion of Nelson’s property that was free of debris before 2009, but covered with debris now. The photos attached to Nelson’s declaration show debris which is old. (CP 82-86). None of those photos depict conditions at the boundary between the Nelson property and the County’s property. Simply stated, there is no admissible evidence that “actual and substantial” damage has occurred since 2009 (much less that any such material came from the County’s property). Absent proof of new and *substantial* damages which have arisen since 2009, Nelson’s claims are barred by limitations. Wallace v. Lewis County, 134 Wn. App. 1, 137 P.2d 101 (2006).

Moreover, even if Nelson had offered competent evidence that a small amount of debris had “migrated” onto his property during the past two or three years, that would still not suffice to support a claim for continuing trespass. As the Washington Court of Appeals made clear in Wallace, a party cannot recover under a theory of continuing tort where (a) the damage arose prior to the statutory limitations period; or (b) the



damage is *attributable* to problems that existed before that time:

Because the three year statute of limitations limits the time period for which Gee Cee can collect damages, Gee Cee must necessarily show that the damages it claims occurred during the three year statutory period; *its actionable damages cannot have arisen before this three year time period or be attributable to problems existing on Petty's property before then.*

134 Wn. App. at 17 (emphasis added).

Applying the Wallace test, Nelson's continuing trespass claim clearly fails. It is not seriously disputed that the damages of which Nelson complains are at least "attributable to problems existing" before the three year statutory period. Thus, continuing trespass is not a viable theory of recovery in this case.

In this case, there is not a shred of evidence that the condition of which Nelson complains arose after 2009. Indeed, Nelson admits he has known of the condition since 2007.

Nelson nonetheless argues that the standing requirement should not apply to him, because he did not thoroughly inspect the property and therefore paid too much for the land. Nelson's position seems to be that a property owner who does not do a thorough inspection of his property before purchasing may be immune from legal "standing" requirements. Not surprisingly, Nelson cites no court which has ever so held.

Nelson has admitted that he visited the property three times before he purchased it. (CP 15). Furthermore, his own photographs depict debris that is plainly visible to the naked eye. (CP 82-90). He thus had every

opportunity to discover the debris on his property, which he now concedes is in plain sight. Nelson cannot avoid the “standing” doctrine for inverse condemnation by arguing that he failed to carefully inspect his property or notice the debris before purchase. Standing is a question of law. Guardianship of Cobb, 172 Wn. App. 393, 401, 292 P.3d 772 (2012).

This case is a classic example of why statutes of limitations exist, and why the courts are reluctant to find exceptions to them. The purpose of a statute of limitations is to provide finality. Atchison v. Great Western Malting Co. 1612 Wn.2d 372, 166 P.3d 662 (2007). The defense of the statute of limitations is entitled to the same consideration as any other defense. Guy F. Atkinson Co. v. State of Washington, 66 Wn.2d 670, 430 P.2d 880 (1965).

The policy reasons for applying statutes of limitations were thoroughly discussed by the Court of Appeals in Kittinger v. Boeing Co., 21 Wn. App. 484, 585 P.2d 812 (1978):

The statute of limitations effectuates two different policies [citations omitted]. First is the policy of repose, i.e., it is intended to instill a measure of certainty and finality into one’s affairs by eliminating the fears and the burdens of threatened litigation. Second, it is intended to protect one against stale claims because they are more likely to be spurious and consist of untrustworthy evidence than are fresh claims. One is also less likely to have witnesses and relevant evidence available to defend against stale claims.

21 Wn. App. at 486-87.

The above policy considerations are clear in this case. The alleged tortious activity of which Nelson complains occurred many decades ago.

There is no witness who has provided any evidence of tortious activity by the County since the late 1970s. Moreover, the County now has a pristine transfer station in place and the property which Nelson owns has gone through multiple ownerships between the 1970s and the time of his purchase. The source of the debris on his property can never be determined with confidence. Under these circumstances, it is unfair for Shannon Frame to have to defend claims for incidents allegedly occurring more than 30 years ago and after the statute of limitations has passed. The trial court properly applied the statute of limitations as a bar to Nelson's claims.

VI.         

CONCLUSION

For all the above reasons, this Court should affirm the summary judgment order entered by the trial court.

DATED this 24<sup>th</sup> day of June, 2013.

Shannon frame

By: 

Shannon Frame

# **AFFIDAVIT OF SERVICE**

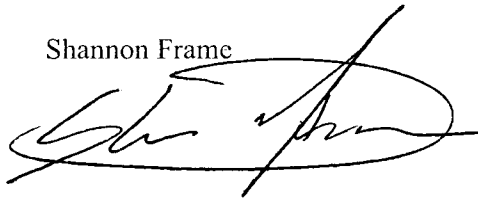
STATE OF WASHINGTON                    )  
  ) ss.

I am a citizen of the United States of America; State of Washington. I certify under penalty of perjury under the laws of the State of Washington that on JUNE 24th, 2013, a true copy of Brief of Respondents was served to the following by electronic mail and United States Mail, first-class, postage-paid:

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Shannon Frame

A handwritten signature in black ink, appearing to read 'Shannon Frame', written over a horizontal line.